

APR 13 1954

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

October Term, 1954

No. ~~61~~ 38

UNITED STATES OF AMERICA,

Petitioner,

v.

PETER BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM FOR RESPONDENT.

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IN THE
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No. 654

UNITED STATES OF AMERICA,	}
Petitioner,	
v.	
PETER BROWN.	}

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit.

MEMORANDUM FOR RESPONDENT.

Opinions Below.

The memorandum opinion of the United States District Court for the Southern District of New York (R. 22) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 29-31) is reported at 209 F. 2d 463.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether a discharged serviceman, who receives treatment at a Veterans' Administration Hospital, may sue the

United States of America under the Federal Tort Claims Act for injuries sustained by him as a result of the negligence of hospital employees.

Statutes Involved.

The Federal Tort Claims Act, 28 U. S. C. 1346(b), and Section 31, Act of March 28th, 1934, 48 Stat. 526, 38 U. S. C. 501a, are set forth in the petition at pages 2-3.

In addition, the Federal Tort Claims Act provides:

(28 U. S. C. A. 2674). The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages * * *.

(28 U. S. C. A. 2680). Exceptions.

The provisions of this chapter and Section 1346(b) of this title shall not apply to:

- (a) Any claim based upon an act or omission, of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
- (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
- (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

- (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.
- (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
- (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
- (g) Any claim arising from the injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.
- (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
- (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
- (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
- (k) Any claim arising in a foreign country.
- (l) Any claim arising from the activities of the Tennessee Valley Authority.
- (m) Any claim arising from the activities of the Panama Railroad Company. June 25, 1948, c. 646, 62 Stat. 984, amended July 16, 1949, c. 340, 63 Stat. 444.

Statement.

This is an action brought under the Federal Tort Claims Act to recover for personal injuries sustained by the respondent when he was a patient at a Veterans Administration Hospital.

The respondent had served in the Army Air Force from October 27, 1942, to August 6, 1944. He was honorably discharged on the latter date with a service connected disability, having been injured in the left knee during military operations in New Guinea. Upon his discharge, he was able to walk, but upon any sudden or any strenuous movements, his left leg would become dislocated. Six years later, on March 8, 1950, he was operated upon by the Veterans Administration for the purpose of "cleaning up" the knee joint. His leg continued to dislocate frequently, however.

Pursuant to his status as a veteran, the respondent was admitted to the Veterans Administration Hospital at 130 Kingsbridge Road, Bronx, New York, on October 1, 1951, for examination and possible treatment. It was decided at that time that another operation should be performed on his left knee for the purpose of preventing the leg from dislocating. The operation was performed on October 4, 1951. It was to be a so-called bloodless operation, requiring the application of a tourniquet on the left thigh. The tourniquet was applied by an operating room attendant in the employ of the Veterans Administration. The tourniquet was defective in that the pressure gauge was not registering and an excessive amount of pressure was applied to the respondent's leg. The attendant should have realized that the tourniquet was defective as soon as it was applied, but he did not.

As a result of the excessive pressure, the nerves in the respondent's leg were seriously and permanently injured. The respondent was confined to the hospital for approximately sixteen weeks thereafter, and for a long period after that was required to report to the hospital each day for treatment. He lost all sensitivity in portions of his left leg below the knee, and he has lost control of some of the muscles in that portion of the leg. He is unable to walk without an orthopedic brace and at this time it appears that he will never regain the full use of his leg.

The respondent received a pension from the Government upon his discharge. This pension was increased as a result of the injury he sustained in the Veterans Administration Hospital in 1951.

The respondent filed his complaint against the United States under the Federal Tort Claims Act, on April 14, 1952, in the United States District Court for the Southern District of New York. After answering, the United States moved to dismiss the complaint, "for failure to state a claim upon which relief can be granted."

The District Court granted the motion, noting that there was a square conflict of authority between the circuit courts on the pertinent question.

The respondent herein appealed to the Court of Appeals for the Second Circuit, and that Court reversed.

Reasons for Not Opposing the Petition.

Basically, the principal question herein is one of statutory construction. The question is whether the Federal Tort Claims Act, as written, and as interpreted by this Court, provides a remedy for a discharged veteran who is injured, through negligence, at a Veterans Administration Hospital. There is a clear conflict on this question. *Santana v. United States* (1st Circuit, 1949), 175

Fed. 2d 320, and *Bandy v. United States* (D. C. Nevada, 1950), 92 Fed. Supp. 360, as well as the decision below in the instant case allow such recovery. *O'Neil v. United States* (D. C. Circuit, 1953), 202 Fed. 2d 366 and *Pettis v. United States* (D. C. Calif., 1952), 108 Fed. Sup. 500, hold that such a recovery may not be had.

The present conflict is due, in large part, to a difference of opinion among the Courts as to what this Court held in *Feres v. United States* (1950), 340 U. S. 135. Thus, the United States claims in the petition that the *Feres* decision is of general applicability, holding that the existence of an administrative compensation system bars an action for additional damages under the Federal Tort Claims Act by anyone who has received Veterans Compensation.

The Circuit Court below, rejected this view of the *Feres* case. The Court below held that the *Feres* decision only barred an action under the act to a claimant who was a serviceman on active duty and not on furlough when the tort occurred.

Thus, the question is one which should be determined by this Court. The respondent would prefer to have such a determination before incurring the expense and difficulties necessarily attendant to proceeding to trial.

CONCLUSION.

For the reasons set forth above, the respondent does not oppose the petition.

Respectfully submitted,

LEE S. KREINDLER,
Counsel for Respondent.

March, 1954.